United States Supreme Court

October Term, 1975

No. 75-1161

COHOES HOUSING AUTHORITY,

Petitioner,

against

IPPOLITO-LUTZ, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

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Petitioner is loathe to enter into an argument over the facts of this case. However, Respondent's Brief contains blatant accusations with respect to the correctness and the propriety of the Statement of the Case contained in the Petition. These groundless accusations necessitate a reply.

The decision of the lower court to strike the petitioner's answer is found in the Memorandum Opinion of the Hon. John H. Pennock, Justice of the Supreme Court, dated May 11, 1967. Pursuant to state court procedure the opinion stated that Judge Pennock would sign an order upon its being submitted to him by the respondent. An order was subsequently submitted and was signed by the Judge on May 22, 1967. Between the time of the rendering of the written decision and the signing of the order, petitioner presented to Judge Pennock an application in the form of a proposed order to show cause for reargument. At page 8 of the Respondent's Brief before this Court it is inferred that such application, without notice, was improper. Not only is this practice acceptable in New York State, but it is the proper practice under the circumstances. The courts have stated:

> The proper practice is to submit to the judge who decided the motion a short affidavit setting

> forth the decision and the asserted ground for reargument and request an order to show cause. If on reading that affidavit the judge thinks there is reason for reargument he will sign the order to show cause. If he reach the contrary conclusion he will refuse it and the matter is ended without an expenditure of the time and labor necessary to put a motion on the calendar, have the parties answer on the return day, and then have the motion referred to the judge who heard the original motion. *Ellis v. Central Hanover Bank and Trust Company*, 1951, 198 Misc. 912, 102, N.Y.S.2d 337; *DeWindt v. O'Leary*, D.C.N.Y. 1954, 118 F.Supp.915.

Petitioner herein appealed to the Appellant Division, Third Department, of the Supreme Court of the State of New York from the judgment entered upon the order of the Special Term striking the petitioner's answer. On that appeal a printed record was filed with the Appellate Division. The contents of this printed record was stipulated to by the parties. Pursuant to the stipulation the papers which had been presented to Judge Pennock in support of the application for reargument were deleted from the record. In its Brief to this Cour at page 12 respondent states that petitioner stipulated that the papers in support of reargument were "improper and should be expunged from the record and brief." This is clearly a misstatement of the stipulation; petitioner at no time stipulated that these papers were "improper". In fact these papers were subsequently presented by petitioner upon a motion to the Appellate Division, Third Department, for reargument and for leave to appeal to the Court of Appeals and also upon a motion to the Court of Appeals of the State of New York for leave to appeal to that court. Respondent made no attempt to have the papers in question deleted from these motion papers and these papers were before the respective courts. (See Respondent's Brief, page 12).

Rule 5(d) of the Federal Rules of Civil Procedure mandates that all pleadings be filed with the Clerk of the District Court.

When there is an appeal it is the duty of the clerk to transmit the record to the appellate court. (Rule 11, Federal Rules of Appellate Procedure.) The Civil Practice Law and Rules of the State of New York does not contain a provision similar to Rule 5(d); pleadings are not necessarily always filed with the clerk of the state court. Accordingly, in New York State it is the duty of the appellant to file the record with the appellate court. (Civil Practice Law and Rules, R.5530.) In preparing the record on appeal, "the parties or their attorneys may stipulate as to the correctness as to the entire record on appeal or *any portion thereof* in lieu of certification." (emphasis added). Thus New York State procedure permits the parties to an appeal to stipulate as to what is the proper printed record for the purposes of the appeal. However, the fact that the respective parties stipulate that a patently insufficient record meets with their approval does not preclude the court on appeal from reviewing what is a proper record. See, *Guarnacci v. Ferguson,* 28 A.D. 2d, 839, 287 N.Y.S. 2d 471.

Attorneys for petitioner and respondent stipulated to the contents of a printed record for the appeal to the Appellant Division, Third Department. Respondent has requested that this stipulated record be transmitted to this Court. (Respondent's Brief, p. 2.) In Respondent's Brief, pages 15-17, there appears the contents of respondent's original notice to produce. Petitioner's alleged failure to comply with this notice to produce was the basis for the court's ultimate determination to strike petitioner's answer. This determination and the subsequent judgment are the subject of the present application to this Court. The notice to produce, which is set forth in Respondent's Brief, is not in the stipulated record which was before the Appellate Division, Third Department. It would be ludicrous to argue that the very notice to produce, which resulted in the striking of petitioner's answer, should not be part of the record of this case. Yet, it was not within the record to which the parties stipulated. Rules 21 and 25 of the Rules of the Supreme Court of the United States provide that a record need not be transmitted to this Court until after certiorari is granted. If the Court grants certiorari in this case, there will be

ample opportunity to have the entire and proper record from the state courts prepared and transmitted to this Court for tis consideration upon the merits.

Respondent argues in his Brief that petitioner has improperly included certain facts within its Statement of the Case which are not supported by the record below. It is difficult to give serious consideration to this argument after reviewing the Statement of the Case contained in Respondent's Brief. This statement is replete with references to various demands having to do with pretrial discovery, with orders from the courts below, with alleged delaying tactics and bad faith negotiation on the part of petitioner, and even with a reference to petitioner's alleged refusal to pay the judgment which is the subject of the Petition before the Court. All of these things smack of the very impropriety of which the respondent accuses the petitioner. None of the statements or allegations of the respondent are substantiated by the record below and are irrelevant to the issues now before this Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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